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ABSTRACT

Intended as a reference to assist city and county attorneys, leading cases are presented detailing essential legal issues pertaining to cable television. These cases relate to broadcast decisions, common carrier decisions involving microwave and telephone companies, and cable decisions involving Federal Communications Commission (FCC) and local government regulatory authority, pay-cablecasting, copyright liability, and regulatory fees. (CMV)

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SYNOPSES OF CASES ON CABLE TELEVISION

April, 1974

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INTRODUCTION

This bibliography was compiled to serve as a time-saving reference on leading cable television cases to assist city and county attorneys. Hopefully, it will convey to the reader the essential issues in the law pertaining to cable television.

This report necessarily includes at the beginning, Section One of the Communications Act of 1934 which establishes the Federal Communications Commission; a survey of the major broadcasting cases which have some impact upon cable regulation; and a review of pertinent common carrier decisions which constituted the first step in the Commission's assertion of jurisdiction over cable television.

The courts have held that the Federal Communications Commission's authority over cable television is derived from Congress' power over interstate commerce. Congress has delegated some of that power to the FCC. Section One of the Communications Act, 48 Stat. 1064, as amended, 47 U. S. C. Sec. 151, states:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

I. BROADCAST DECISIONS

A review of important broadcasting cases will contribute to a better understanding of the cable cases to follow.

F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134 (1939).

The Court held that the FCC has broad powers under the Communications Act of 1934.

In 1936, the Commission denied an application for a construction permit by Pottsville Broadcasting Company on the grounds that: 1) the company was not financially qualified under Pennsylvania law; and 2) that the company did not sufficiently represent local interests in the community which it proposed to serve. The applicant appealed the decision. The Court of Appeals found that the decision had been based upon an erroneous understanding of Pennsylvania law, and reversed, ordering the cause to be remanded to the Commission. 98 F. 2d 288 (D.C. Cir. 1938).

Upon receiving Pottsville Broadcasting Company's petition to grant its original application, the Commission directed that argument on this petition be heard along with those of two rival applicants. The Commission wanted to "determine which, 'on a comparative basis' in the judgment of the Commission will best serve public interest." 309 U. S. at 140. Respondent, Pottsville Broadcasting Company, obtained from the Court of Appeals a writ of mandamus ordering the Commission to set aside its order and to reconsider respondent's petition on a non-comparative basis. The FCC appealed.

The Supreme Court reversed. The Court held that the lower court lacked the authority to issue this writ. "...[T]he court was restricted to a

purely judicial review." 309 U. S. at 144. The Court held that the lower court's role is to correct errors of law and to remand the Commission, which is bound to act upon the correction. "But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." 390 U. S. at 145.

The Court found that the Commission had corrected the error of law (misapplication of Pennsylvania law) and moved to carry its responsibility to judge applications by the standard of "public convenience, interest, or necessity." 309 U. S. at 137. The Court held that this standard is the "touchstone for the exercise of the Commission's authority." 309 U. S. at 138.

In summary, the Court held that where the FCC has so corrected its error in law, it was free to consider the applications on a comparative basis pursuant to its own rules of procedure; and that the Court of Appeals lacked the authority to issue the writ of mandamus.

National Broadcasting Company, Inc. v. United States, 319 U. S. 190 (1943).

The Court held that the regulatory powers of the Commission are not limited to the engineering and technical aspects of radio communication. The Court upheld the authority of the FCC to deny broadcast licenses to network affiliated stations which entered into contracts that restricted their freedom to broadcast programs of other networks.

In May of 1941, the Commission adopted regulations which restricted network practices of preventing affiliated radio stations from carrying programs produced by other networks. An FCC study found that stations were often prevented from carrying non-network programming even when it was not otherwise available to the community. For example, the Commission found that thousands of people were unable to hear the 1939 World Series baseball games because NBC and ABC refused to allow their affiliates to carry Mutual network games even in communities where there was no competing Mutual station.

> Restraints having this effect [the Commission observed] are to be condemned as contrary to the public interest irrespective of whether it be assumed that Mutual programs are of equal, superior, or inferior quality. The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated....Our conclusion is that the disadvantages resulting from these exclusive arrangements far outweigh any advantages. 319 U. S. at 199.

NBC challenged the FCC's authority to issue such regulations. The Court rejected any narrow or limited interpretation of the Commission's role.

> The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. 319 U. S. at 215.

Red Lion Broadcasting Company v. F. C. C., 395 U. S. 367 (1969). [See also Footnote 1.]

The Court upheld the constitutionality of the fairness doctrine.

The fairness doctrine requires fair coverage of controversial issues of public importance which are presented on broadcast stations. The FCC has imposed this requirement on broadcasters since the early days of regulation of the industry. As a refinement of the fairness doctrine, the Commission has required that in instances where personal attacks are made, a station must provide reply time to the individual.

In this case, Red Lion Broadcasting Company challenged the Commission's determination that it had violated the fairness doctrine during one of its broadcasts. Red Lion argued that the FCC had abridged its First Amendment rights in enforcing the fairness doctrine against it. The Court of Appeals upheld the Commission's position as constitutional. The Supreme Court affirmed the decision of the Court of Appeals noting that,

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount ....It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market. whether it be by the Government itself or a private licensee ....It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. 395 U. S. at 390.

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1. It should be noted that in its analysis of Red Lion, the Justice Department has concluded that:

> The same (First Amendment) principle is applicable to the CATV operator enjoying a transmission monopoly. He may not arbitrarily refuse to deal with an independent programmer, particularly where the CATV operator is in the business of programming himself. Reasonable and non-discriminatory access to the system must be provided to all in the trade. [Comments of the Justice Department, FCC Docket No. 18397. September 8, 1969.]

Columbia Broadcasting System v. Democratic National Committee, 36 LE 2d 772, 93 S. Ct. 2080 (1973), reversing Business Executives Move for Vietnam Peace v. F. C. C., 450 F. 2d 642 (D. C. Cir. 1971).

The Supreme Court held that the broadcast policy of refusing to accept editorial advertisements while accepting commercial advertisements does not constitute a violation of the Communications Act of 1934 or the First Amendment.

The Court also held that "under the fairness doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good faith effort to meet the public interest is being fully and fairly informed." 93 S. Ct. at 2098.

The Court rejected the notion, put forth by the Business Executives Move for Vietnam Peace and the Democratic National Committee, that the broadcasters' refusal to accept editorial advertising constituted an invidious discrimination against protected speech. Finding no discrimination against controversial speech, the Court stated, "the question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when." 93 S. Ct. at 2100.

The Court concluded that the fairness doctrine provides an orderly procedure for covering controversial issues. The Court rejected the Court of Appeals ruling, stating that its "holding would serve to transfer a large share of responsibility for balanced broadcasting from an identifiable, regulated entity--the licensee--to unregulated speakers who could afford the cost." 93 S. Ct. at 2100.

II. COMMON CARRIER DECISIONS

A. MICROWAVE

Carter Mountain Transmission Corp. v. F. C. C., 32 F. C. C. 459, aff'd 321 F. 2d 359 (D. C. Cir. 1962), cert. denied, 375 U. S. 951 (1963).

The Court upheld the Commission's authority to deny an application by Carter Mountain Transmission Corp. to construct a microwave radio communication system for a cable operator.

The Commission based its decision on a finding that the single television station located in Riverton, Wyoming might be in financial danger if a cable system were constructed there, and that if the station should cease to operate, one-half of the people living in the outlying areas would no longer have any television service because cable service would not reach them. The Commission concluded that approval of the application would not be in the public interest.

The Court allowed the FCC to consider the adverse economic impact on the television station in making the decision because the Commission should be able to take into account its total regulatory responsibilities when trying to solve specific problems within its jurisdiction.

B. TELEPHONE COMPANIES

An early step in the Commission's gradual assertion of jurisdiction over cable television was the regulation of telephone companies serving cable television systems.

1. General Telephone Co., 13 F. C. C. 2d 448 (1968), aff'd General Telephone Co. v. F. C. C., 413 F. 2d 390 (D. C. Cir. 1969), cert. denied, 396 U. S. 888 (1969).

The Court upheld the Commission's authority to require telephone companies to obtain certificates of convenience and necessity pursuant to Section 214(a) of the Communications Act as a prerequisite to building and operating distribution facilities to provide service to cable television systems, and its authority to issue cease and desist orders to those telephone companies already engaged in the construction and operation of such facilities until such certificates were obtained.

In this action several operating telephone companies and their corporate parent organizations challenged the Commission's jurisdiction over their activities as intrastate and not interstate in nature, thus falling outside its jurisdiction. However, the Court determined that the service performed was, indeed, interstate in nature.

> The controlling facts here are that the cable facilities furnished by the telephone companies are links in the continuous transmission of the signals from the point of origin to the set of the viewer, and the intelligence received by the viewer is essentially the same as that transmitted by the broadcaster. Irrespective of the location of its physical facilities, the common carrier which thus participates as a link in the relay of television signals is performing an interstate communications service. 413 F. 2d at 398, quoting 13 F. C. C. 2d 448, 455 (1968).

The Court held that the Commission had acted within the scope of its authority and that:

> The petitioners (telephone companies) have, by choice inserted themselves as links in this indivisible stream and have become an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission. 413 F. 2d at 401.

2. Better TV, Inc. v. New York Telephone Co., 31 F. C. C. 2d 142 (1972), 23 R. R. 2d 1 (1972).

The Commission refused to grant a certificate to the telephone company where the cable system to be served had not obtained a franchise from the community to be served. However, stating that "our determination not to certificate the construction of facilities for a channel service customer which holds no francise from the community to be served is based upon the particular facts of record developed at the evidentiary hearing," the Commission clearly disavowed any intention to "resolve here the policy questions concerning the respective roles of the federal and local governments in the regulation of CATV." 23 R. R. 2d at 13.

3. Pole attachments and conduit agreements

In light of evidence that telephone companies had accorded preferential treatment to affiliated cable television systems and engaged in anticompetitive pole line attachment policies the Commission asserted jurisdiction over pole attachments and conduit agreements and arrangements for cable television usage.

a. California Water and Telephone Co., Public Notice FCC 73-851 released August 3, 1973.

   The Commission stayed the formal rulemaking proceedings for a 90-day period in order to give the parties in the case adequate time to reach a satisfactory agreement. (The original 90-day period has been extended twice.) Municipalities will be bound by this decision.

b. California Water and Telephone Co., 23 F. C. C. 2d 840 (1970).

c. California Water and Telephone Co., 22 F. C. C. 2d 586 (1970).

d. California Water and Telephone Co., 22 F. C. C. 2d 10 (1970).

e. T. V. Signal Co. v. American Telephone and Telegraph Co., 462 F. 2d 1256 (8th Cir. 1972).

f. Armstrong Utility Inc., 25 F. C. C. 2d 385 (1970).

g. Manatee Cablevision, Inc., 22 F. C. C. 2d 841 (1970).

h. TeleCable Corp., 19 F. C. C. 2d 574 (1969).

III. CABLE DECISIONS

A. FCC REGULATORY AUTHORITY

Several major decisions uphold the Commission's assertion of authority to regulate cable television systems.

1. Buckeye Cablevision, Inc. v. F. C. C., 387 F. 2d 220 (D. C. Cir. 1967).

The court expressly upheld the authority of the Commission to hold rulemaking proceedings to regulate cable television. Characterizing cable television as a form of wire communications which enlarged the signal range of broadcasters, the court concluded that under the Communications Act of 1934, the Commission could assert jurisdiction over cable.

2. U. S. v. Southwestern Cable Co., 392 U. S. 157 (1968).

The Supreme Court upheld the Commission's authority to regulate cable television systems, and to issue cease and desist orders.

Southwestern Cable Company petitioned the Court of Appeals for the Ninth Circuit to review an FCC decision to restrict the expansion of one of its cable systems pending hearings to determine if a particular television station would be adversely affected by such expansion. The Court of Appeals held that the FCC lacked the authority to issue the order.

The Supreme Court reversed. The Court rejected any restrictive construction of the Act, and held that Congress conferred broad authority upon the Commission.

"Thus, 'underlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting

and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors'." 392 U. S. at 172 quoting F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134, 138 (1939). The Court determined that the recognition of the Commission's authority to regulate cable was "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting ...." 392 U. S. at 178. And that for those purposes, the Commission might issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law" as "public convenience, interest, or necessity requires." 47 U. S. C Sec. 303(r).

3. Black Hills Video Corp. v. F. C. C., 399 F. 2d 65 (8th Cir. 1968).

The validity of FCC rules regulating signal carriage and non-duplication of programming was upheld by the court as being within the guidelines of Southwestern Cable.

Black Hills Video Corp. challenged the Commission's authority to prohibit its carriage of a program broadcast by a local TV station on the same day. The court stated that the Commission adopted the rules to protect the public interest; and that these rules did not place an

unconstitutional burden upon cable companies.[2]

4. U. S. v. Midwest Video Corp., 406 U. S. 649 (1972). rev'g 441 F. 2d 1322 (8th Cir. 1971).

The Court affirmed the validity of the Commission's regulations requiring cable operators to originate programming.

In October of 1969, the FCC adopted a rule providing that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for

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2. The Courts have repeatedly rejected challenges to the Commission's authority to issue nonduplication rules.

a. Winchester TV Cable Co. v. F. C. C., 462 F. 2d 115 (4th Cir. 1972). cert. denied 409 U. S. 1007 (1972).

b. Port Angeles Telecable, Inc. v. F. C. C. 416 F. 2d 243 (9th Cir. 1969).

c. Great Falls Community TV Cable Co. v. F. C. C., 416 F. 2d 238 (9th Cir. 1969).

d. Total Telecable, Inc. v. F. C. C., 411 F. 2d 639 (9th Cir. 1969).

e. Community Television Inc. v. United States, 404 F. 2d 771 (10th Cir. 1969).

f. Titusville Cable TV, Inc. v. United States, 404 F. 2d 1187 (3rd Cir. 1968).

g. Conley Electronics Corp. v. F. C. C., 394 F. 2d 620 (10th Cir. 1968). cert. denied 393 U. S. 858 (1968).

h. Wheeling Antenna Co. v. United States, 391 F. 2d 179 (4th Cir. 1968).

i. Meadville Master Antenna, Inc. v. F. C. C., 443 F. 2d 282 (3rd Cir. 1971).

j. Community Service, Inc. v. United States, 418 F. 2d 709 (6th Cir. 1969).

local production and presentation of programs other than automated services." 47 CFR Sec. 74.1111(a). (See 47 CFR Sec. 76.201 for the amended version of rule currently included in the cable television rules.)

Midwest Video Corporation challenged the Commission's authority to adopt such a ruling. The Court of Appeals ruled that this particular rule "goes far beyond" the FCC's authority to adopt rules that are "reasonably ancillary to its responsibilities in the broadcasting field." 441 F. 2d at 1326-27. In addition, the Court found that the decision to adopt the rule was not supported by substantial evidence that it would serve the public interest, and was therefore invalid.

The Supreme Court reversed, holding that the program origination rule was "reasonably ancillary" to the Commission's responsibilities in the broadcast field in that it would "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services...." 406 U. S. at 654 quoting First Report and Order, 20 F. C. C. 2d 201, 202 (1969).

B. LOCAL GOVERNMENT REGULATORY AUTHORITY

1. TV Pix Inc. v. Taylor, 304 F. Supp. 459, aff'd per curiam 396 U. S. 556, 24 L. Ed. 2d 746, 90 S. Ct. 749 (1970).

TV Pix, Inc. sued to have a Nevada statute regulating cable television declared unconstitutional as a burden on interstate commerce. The plaintiff also argued that Congress had preempted the field, and that the statute deprived the plaintiffs or their property without due process of law.

The court found that "the subject of regulation contemplated by the Nevada statute...are subjects which lend themselves naturally to local control and supervision" and that those subjects did not constitute a burden on interstate commerce. The court also stated that as "there is no reason to conclude that community antenna service is not monopolistic in character and is not affected with the public interest...." "[S]tate supervision of it as a public utility does not conflict with the Fourteenth Amendment." 304 F. Supp. at 467.

2. Wonderland Ventures, Inc. v. City of Sandusky, 423 F. 2d 548 (1970). [See Footnote 3.]

The court held that city ordinances requiring fees to be paid based upon percentages of gross receipts were invalid on two grounds: "1) because they impose a gross receipts tax upon proceeds from interstate commerce in violation of the commerce clause of the Constitution...and, 2) because they do not contain definite standards for regulation and administration." 423 F. at 551.

3. City of Owensboro v. Top Vision Cable Co. of Kentucky, 487 S. W. 2d 283 (Ky. 1972).

The Kentucky Court of Appeals, following the rule in Wonderland Ventures v. Sandusky, held the cable television ordinance with a 26 per cent

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3. This ruling by the Sixth Circuit has not been followed by other courts and has been largely ignored in law review articles about cable television.

franchise fee to be invalid. However, it also held that cable television is a proper subject for city regulation by franchise, and ordered the case remanded for a determination of a reasonable percentage of the fees paid by Top Vision prior to invalidation of the ordinance which might be retained by the city.

4. Springfield Television, Inc. v. City of Springfield, Mo., 462 F. 2d 21 (8th Cir. 1972).

The court ordered the city to hold new franchise proceedings. Among the factors leading to this decision were franchise provisions calling for a lump sum payment of $100,000 and 12.1 percentage of gross receipts to be paid by the cable system as a franchise fee, which violated FCC rules limiting franchise fees to 3 to 5 per cent of gross subscriber receipts. The court ordered a new solicitation of bids in compliance with the rules.

C. PAY-CABLECASTING

Pierson, Ball & Dowd, 31 F. C. C. 2d 747 (1971).

The Commission has recognized that pay-cablecasting may be in the public interest and has therefore authorized pay operations. "Accordingly, the Commission has preempted the field of pay television cablecasting so that local franchise terms are inoperative and no further affirmative authorization is required."

D. COPYRIGHT LIABILITY

The Supreme Court has held that cable television systems are not liable for copyright fees.

1. Fortnightly Corp. v. United Artists Television, Inc. 392 U. S. 390 (1968).

The Court held that cable television systems were not liable for copyright fees when retransmitting television broadcasts.

United Artists Television, Inc.sought to hold the cable television company liable for "performing" motion pictures without a license. The cable television corporation carried signals of five television stations which had obtained licenses from United Artists Television, Inc., to broadcast said motion pictures. But the licenses did not authorize carriage by cable television and, in some instances, specifically prohibited it. Fortnightly claimed that it had not "performed" the works in violation of the Copyright Act of 1909. The Court upheld the claim of the cable company, distinguishing cable television systems which merely retransmit broadcast signals from broadcast television stations which "exhibit" works. The Court determined that cable television systems should be treated as television viewers, i.e., passive beneficiaries of broadcast performances.

It should be noted that this case involved cable television systems which merely retransmitted broadcast signals as received. There was no editing of material nor program selection involved. Neither of the systems originated programming.

2. CBS v. Teleprompter, _____U.S._____, 43 U. S. L. W. 4323. Rev'g 473 F. 2d 388 (2d Cir. 1973).

The Supreme Court has again held that cable television systems are not liable for copyright fees.

The case was on appeal from the Second Circuit Court of Appeals, which had held that when signals are extended beyond their normal reach, by the use of either microwave or cable television, the cable operator "performs" the work and copyright liability attaches. The Court of Appeals had reasoned that as respects distant signals, a cable system is the "functional equivalent" of a broadcaster, and, as was stated in Fortnightly (the original case holding that no copyright liability attached with regard to local signals), "Broadcasters perform. Viewers do not perform." Since a "performance" triggers liability under the Copyright Act, broadcasters have it and viewers do not.

It was argued in this case that the "function" of cable systems had changed since Fortnightly was decided, making them more like broadcasters, because cable systems now (1) originate programs, (2) sell advertising time, and (3) interconnect. The Court found the logical flaw in the argument to be that "in none of these operations is there any nexus with the defendents' reception and rechanneling of the broadcasters' copyright materials." pp. 8-9. The Court held that "these new functions, even though they may allow CATV systems to compete more effectively with the broadcasters for the television market, are simply extraneous to a determination of copyright liability with respect to the reception and retransmission of broadcasters' programs." p. 9.

Having rejected the "functional" argument, the Court went on to reject the locally-imported distinction on which the Second Circuit had relied in finding cable systems to have copyright liability for imported signals. Three distinct arguments were rejected:

(a) It was contended that, by importing distant signals, cable systems do more than "enhance the viewer's capacity to receive the broadcaster's signals,...and instead bring signals into the community that would not otherwise be receivable on an antenna," p. 12, thus altering the function performed for subscribers. The Court held that the reception and rechanneling of signals is nevertheless a "viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer." p. 13.

(b) It was argued that because cable systems exercise some choice and selection among alternative sources, they function in the same way as network affiliates that choose the mix of national and local programming they broadcast. The Court disagreed, pointing out that cable operators leave only a limited choice, and that, once the choice is made, they merely carry what they receive without editing any of it. In Fortnightly, the Court had distinguished broadcasters (which "select," "procure" and "propagate" programming) from cable systems (which merely carry what they receive) in holding that broadcasters perform. The Court held that none of those "broadcast" functions is performed by cable operators with respect to imported signals.

(c) Finally, it was argued that importation "should entail copyright infringement liability because of the deleterious impact of such retransmission upon the economics and market structure of copyright licensing." p. 15. The Court's short answer was that "the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated

on the basis of the size of the direct broadcast market augmented by the size of the CATV market." p. 18.

E. CABLE REGULATORY FEES

National Cable Television Association, Inc. v. United States, _____U.S._____, 42 U. S. L. W. 4306 (March 4, 1974).

In a 5 to 2 decision the Supreme Court held that fees imposed on cable operators for the regulation of cable television by the FCC had not been determined in a manner consistent with the Independent Offices Appropriation Act of 1972, the legislation authorizing federal agencies to charge fees. The case was remanded to the FCC for a redetermination of a proper fee in light of the Court's decision.

The Independent Offices Appropriation Act of 1952 provides, in pertinent part, that "any work. . .performed by any Federal agency. . .for any person. . .shall be self-sustaining. . .and the head of each Federal agency is authorized. . .to prescribe. . .such fee. . .as he shall determine. . .to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts."

Pursuant to this Act, the FCC established filing fees which produced revenues amounting to only 25% of its annual appropriation. Subsequently Congress urged the FCC to adjust its fees so that they would fully support its activities. In 1970, the Commission responded by revising fees for licensees and for the first time imposed fees on cable systems. At this time, FCC regulation of cable consisted almost entirely of distant signal carriage rules (which did not necessarily entail any contact whatsoever

with the FCC) and rules prohibiting broadcasters and telephone companies from entering the field.

The Commission estimated its cost for cable regulation to be $1,145,400 for the year in question. It further calculated that adding the old filing fees to a 30-cent fee per system would produce $1,145,000. The Commission concluded that the fee represented "value to the recipient."

The Court rejected this method of calculating the fees because not all of the benefits of cable regulation accrue to cable operators and thus, they can not be required to shoulder the entire bill. The Court concluded that it was ". . .not enough to figure the total cost (direct and indirect) to the Commission for operating a CATV unit of supervision and then to contrive a formula that reimburses the Commission for that amount."